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IN THE MATTER OF QWEST CORPORATION'S COMPLIANCE WITH SECTION 252(e) OF THE TELECOMMUNICATIONS ACT OF 1996	Docket No. RT-00000F-02-0271
IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996	Docket No. T-00000A-97-0238
ARIZONA CORPORATION COMMISSION, Complainant, v. QWEST CORPORATION, Respondent.	Docket No. T-01051B-02-0871
	NOTICE OF FILING

The Arizona Corporation Commission Staff (Staff) hereby files its Reply Brief in the above-referenced matters.

RESPECTFULLY submitted this 29th day of October, 2003.

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ARIZONA CORPORATION COMMISSION, Complainant, v. QWEST CORPORATION, Respondent.	Docket No. T-01051B-02-0871

REPLY BRIEF OF COMMISSION STAFF

I. INTRODUCTION

The Settlement Agreement resolves three Enforcement Dockets initiated by Staff and/or the Commission against Qwest. It was reasonable, given this fact, for Qwest to approach Staff first regarding settlement, and for Staff and Qwest to engage in discussions to determine whether

settlement was possible. Given these facts, the process to adopt the Settlement Agreement was reasonable and did not violate the Commission's Settlement Policy. Further the Settlement Agreement is lawful and does not violate Ariz. Const. Art. XV, Section 16 as alleged by Time Warner.

Several parties object to the Settlement terms because they do not receive more money and the exact same benefits as Eschelon and McLeod received under the agreements, or because Qwest is required to undertake projects designed to benefit consumers rather than competitors. These arguments are without merit. As some of these same parties acknowledge, legal issues arise if the Commission were to order a discount on interstate services or extend the term of the discounts beyond the time period that Eschelon and McLeod received them. Further, consumers were harmed also by Qwest's actions.

In the words of RUCO, no other settlement presented to the Commission has "involved this large a sum of money." Tr. pp. 30-31. The agreement provides for penalties to the State General Fund, voluntary payments toward projects designed to benefit consumers and credits worth over $9 million dollars to benefit CLECs. The Agreement also contains important safeguards designed to ensure that Qwest complies in the future with the requirements of state and federal law, rules or processes that were the subject of the three Enforcement Dockets. The Agreement would also allow the CLECs to opt-into the non-monetary provisions of the unfiled agreements that have been terminated as well. Finally, the Agreement would result in Qwest dismissing its pending appeal of the Commission's Phase II Wholesale Pricing Order in the U.S. District Court for the District of Arizona.

The Settlement Agreement reflects a reasonable resolution of the complex and difficult issues raised, is in the public interest and should be adopted by the Commission.

II. ARGUMENT

A. The Settlement Negotiation Process Was Reasonable

1. The Primary Purpose of the Enforcement Dockets Was to Examine Whether Qwest Violated State or Federal Laws, Rules or Processes and to Determine Appropriate Penalties

MTI, Time Warner and AT&T once again take issue with the settlement negotiation process. MTI Brief, pp. 5-6; Time Warner Brief, p. 5; AT&T Brief, p. 6. All three parties argue that they should have been included at the outset in the process. Yet, as pointed out by Staff in its Initial Brief, AT&T could point to no rule or law which required this outcome. Tr. p. 280. Nor could MTI or Time Warner in their Briefs.[1]

Further, all three parties fail to give any weight to the fact that these were all enforcement dockets initiated by Staff or the Commission against Qwest. Thus, it was not unusual, given these facts that Qwest would have approached Staff; and Staff and Qwest would had some initial discussions to determine whether a settlement was possible. The focus of all three Dockets was whether Qwest had engaged in actions which violated state and federal law, interfered with the Commission's regulatory processes or unreasonably delayed implementation of a Commission order, and appropriate penalties.

In all three Dockets, Staff played a central role in the investigations against Qwest. Staff filed testimony in the 252(e) Docket and the Wholesale Billing OSC Docket, and a report and recommendation in the 271 Sub-docket. The only CLEC to file testimony in any of these dockets was AT&T, in the Wholesale Billing OSC Docket. Had these cases actually been about actual CLEC compensatory damage claims, then filings by the CLECs would have been necessary to establish with certainty the amounts to which they would be entitled.[2]

This does not mean that Staff does not recognize that the CLEC's were competitively disadvantaged or that they were discriminated against because they were not given an opportunity to opt-into the Eschelon and McLeod agreements. Because Staff recognized that other CLECs may have been competitively disadvantaged, Staff had specifically included penalty recommendations to benefit CLECs in the 252(e) case and the Wholesale Billing OSC, many of which were carried forward to the settlement agreement. However, Staff is aware of no requirement that in settling these

[1] Staff inadvertently referred to MTI Witness Hazel, in its Initial Brief, as having been asked about any rule or law requiring the participation of all parties. It was actually AT&T Witness Pelto that was asked the question on cross-examination who could identify no rule or law that required same.

[2] Staff acknowledges that the broad nature of the Release initially circulated by Qwest has apparently created considerable confusion over the scope and nature of the three dockets. Staff has continually stated its position that it is more than willing to review and agree to a Release prior to consideration of the Settlement Agreement by the Commission.

Enforcement dockets with Qwest, it was required to adopt a penalty designed to redress any and all alleged CLEC harm or to do so in the exact same fashion as the provisions of the unfiled agreements between McLeod and Qwest or Eschelon and Qwest.

The settlement contains many benefits for CLECs, some of which are different than Staff's litigation position in these cases. However, one of the primary benefits, is that the benefits will be made available to consumers and CLECs immediately, without years of litigation. Staff Witness Johnson best summarized Staff's position with respect to the CLECs in the following exchange with ALJ Rodda:

> "We wanted CLECs to participate in whatever benefits resulted, at least in terms of our analysis of the Settlement Agreement. We wanted CLECs to participate in the benefits. .....it would be difficult for Staff to calculate the individual damages to each CLEC and seek to fully compensate those CLECs. They are in a better position to know what their damages would be or what they would expect them to be than Staff would. Also there are CLECs that may not have the financial resources to pursue individual proceedings. We were setting up a mechanism, that it's an either or. You can participate under the Settlement Agreement, or you can pursue individual proceedings."

Tr. p. 426.

The exact degree of harm to any particular CLEC would be difficult and time-consuming to determine, and would likely involve lengthy litigation before the issues were ultimately settled. Under opt-in, the CLECs would be required to take the related obligations of the Agreement as well as the benefits. Under the Agreement, they do not assume any of the obligations of the Agreements at issue.

In addition, the CLECs do not have to opt-in to the Settlement Agreement. The CLECs still have the right to pursue other actions against Qwest if they elect not to opt-in to the agreement.

2. The Process was not Exclusionary.

The CLECs attempt to portray the negotiation process as exclusionary and secret. MTI once again drew an unfounded analogy with the Qwest secret agreements case. As pointed out by Staff in its Initial Brief, pp. 18-19, the Staff did not keep the fact that Qwest had approached Staff regarding settlement a secret. In fact, if any party had asked, Staff would have shared this information with them. Indeed, Staff counsel shared this information with AT&T's counsel in a discussion regarding

the Section 252(e) case at least two weeks before the notice was filed in the 271 sub-docket.[3] In addition, RUCO was aware of the negotiations in early June.

The CLECs also portray their opportunity for participation as being much more limited than it actually was. Indeed, they claim that they had no opportunity to meaningfully participate, which is simply not true. See Initial Briefs of Time Warner at 7; MTI at 4; and AT&T at 5. The CLECs appear to have interpreted the fact that Qwest and Staff "agreed" to the settlement principles as meaning that any further negotiation with respect to the principles would not be entertained by Staff. This was not the case. If presented with a compelling argument regarding the need to change a settlement principle, Staff would have pursued the issue with Qwest.

Notice of the settlement negotiations was filed in the 271 Sub-docket on June 27, 2003. The Settlement Agreement was executed by Staff and Qwest and docketed approximately one month later. The hearing on the settlement agreement was not held until September 16-17, 2003. During this entire time period, Staff would have been open to further negotiations by any party on any issue.

Finally, Staff is perplexed with MTI's and Arizona Dialtone's strenuous objections to the settlement process engaged in by Staff. It was Staff's understanding (up until the time MTI filed its Post Hearing Brief in this proceeding) that MTI's only interest was on a rate issue arising from the Wholesale Pricing Docket, an issue that was since resolved in MTI's favor by the Commission in the Wholesale Pricing Docket. MTI in its Post Hearing Brief now complains about the settlement process with regard to the 252(e) proceeding. However, MTI was not an intervenor in the 252(e) proceeding, and thus while it vehemently complains about the settlement process, it would not have been notified of any settlement discussions involving the 252(e) docket to begin with because it was not a party to the underlying docket.

Similarly, it is equally ironic to Staff, that Arizona Dialtone, which itself was not an intervenor in any of the underlying dockets until *after* the Settlement Agreement was executed and filed with the Commission, now comes forward and complains about the process used by Staff to settle the cases. In addition, Arizona Dialtone complains about the settlement agreement executed

[3] Staff further notes that AT&T asked to participate in the discussions, and Staff subsequently required CLEC participation.

between Staff and Qwest, yet Arizona Dialtone was not a participant in any of these cases during their year long pendency at the Commission. Thus, it is hardly surprising that Staff did not know that Arizona Dialtone even had issues much less what those issues were.

While the CLECs complain about the process, as already discussed, no CLEC has been able to point to any rule or law which the Staff violated by not including them initially in the discussions. Nor has anyone been able to demonstrate that they had a due process right to participate in the initial settlement discussions between Staff and Qwest. Moreover, all parties were eventually given an opportunity to participate in the discussions and they were further given an opportunity to submit their position on the settlement to the Hearing Division and they will also have the opportunity to submit their position to the Commission. Therefore, the CLECs complaints regarding process should be rejected.

3. Staff Complied With the Commission's Settlement Policy

Both Time Warner and AT&T argue that the Staff did not comply with the Commission's settlement policy in arriving at the proposed global settlement with Qwest. Time Warner Brief, p. 5; AT&T Brief, p. 8. However, Staff was not required to comply with the policy because it is not applicable to enforcement dockets.

As correctly noted by Time Warner and AT&T, the Commission adopted a policy at its February 8, 2001 Open Meeting regarding notice of settlement discussions in certain Utilities Division cases. However, the policy discussed at the February 8, 2001 Open Meeting requires Staff to provide notice of settlement discussions in all large rate cases and merger dockets only.

Based upon a review of the transcript from that meeting the Staff's understanding has not changed. The Staff's understanding was and is that the 3 day notification applies on large rate cases (not Class D and E's which typically do not involve a hearing) and large merger cases. The Commission decided to start out on this basis and to revise the policy if it believed there was a need in the future.

While Time Warner argues that "[a]ny suggestion that this policy applies only to 'rate cases' surely must fail;" (Brief at 5) even the portion of the February 8, 2001 Open Meeting transcript relied upon by Time Warner indicates that the policy was intended to apply primarily to large rate cases.

Part of the passage relied upon by Time Warner stated "This will be for all cases except D's and E's." Time Warner Brief, Exhibit 3. Class D and E makes reference to the definition of smaller utilities under the Commission's rules. A review of the Open Meeting transcript indicates that this portion of the transcript contained a discussion of the notice requirement applying to larger utility (Class A and B utilities) rate cases. The policy was then clarified further to apply to large merger cases as well.

Staff has always been very diligent in ensuring compliance with the Commission's settlement notice policy; however in this case Staff determined that the policy was not applicable because of the fact that the cases were all enforcement dockets. If any of the cases included in the global settlement had involved a rate case or merger docket, Staff agrees that then the settlement notice policy would have applied. However, they did not.

Because of the fundamental differences between enforcement dockets and large rate cases and/or merger cases involving Class A and B utilities, Staff believes that different settlement policies are warranted. Intervenors in rate cases and mergers often have a direct economic stake in the outcome of those dockets. This is not the case in enforcement dockets which do not affect rates or where the interests of intervenors is not as direct.

Further, the typical enforcement dockets involve actions by the Staff or Commission against a regulated utility. A requirement that Staff may not talk to any respondent without notifying and involving all of the intervenors, may not be productive or desirable in every case. Even with respect to large rate cases and merger dockets, as the Commission discussed at its February 8, 2001 Open Meeting, some discretion must be left with the Staff to determine how best to effectuate the policy.

Time Warner's interpretation of the Commission's settlement policy would mean that Staff would have to give notice in *all* cases regarding possible settlement discussions and wait for three days before engaging in any specific discussions. Staff believes that such a policy in *all* cases would act to chill settlement discussions in many instances and would serve no legitimate purpose in many cases.

Time Warner also argues that:

> "Qwest will never again file a traditional rate case and large cases involving Qwest certainly deserve the same protections afforded other Utilities Division cases."

Time Warner Brief, p. 5.

Contrary to Time Warner's suggestion, Qwest is expected to file what amounts to a traditional rate case, when its restated financials are available for Arizona. In addition, certainly a legitimate question arises as to whether the notice requirement would apply to settlement agreements involving wholesale pricing changes. Staff believes that it would. While one could argue that the OSC docket involved wholesale rate changes, the issue was actually Qwest's failure to implement the rate changes required by Decision 64922 (June 12, 2002) in Docket No. T-00000A-00-194, in a timely manner. Thus actual rate changes of the type involved in a rate case were not at issue in the OSC enforcement docket.

Time Warner also argues that notice could very well have resulted in a different settlement, with broader support and a more rapid timeline for implementation. Time Warner Brief, p. 6. However, as MTI points out, "[i]t is possible that if CLEC parties had been notified of the settlement discussions at the outset and allowed to participate in those discussions from their inception that the resulting Outline of Principles might have been substantially similar to what Qwest and Staff negotiated ..." MTI Brief, p. 5. It is equally possible that if parties had chosen to seriously negotiate, rather than litigate because they believed that everything was a "done deal," that additional changes may have been made which would have resulted in their signing onto the agreement. For instance, one of the issues raised by Time Warner in its Brief was for a "more rapid timeline for implementation"; it is very likely that if Time Warner had chosen to seriously negotiate that issue, rather than litigate because other provisions of the settlement were not to their liking, that they may have been successful on that issue.

B. The Voluntary Contributions Portion of The Settlement Agreement is Lawful and in The Public Interest

1. Section 2 (Voluntary Contributions) Is Not Unlawful

Time Warner alone suggests in its Initial Brief that Section 2 of the Settlement Agreement is unlawful. Time Warner argues that under Article XV, Section 16 of the Arizona Constitution, civil penalties assessed by the Commission are to be paid into the State's general fund, unless otherwise

provided by statute. Brief at 9-10. Time Warner states that "[i]f the $6 million to be set aside for 'voluntary contributions' is in reality a redirected penalty, the Commission is exceeding its authority as it has no constitutional authority to divert penalty payments from the general fund." *Id.* at 10.

Time Warner's arguments are misplaced. First, while the Agreement specifies a value of $6 million dollars associated with Section 2, the value is not in terms of any monetary payments being made to the Commission or the CLECs, as opposed to the State general fund, for that matter. The $6 million dollars specified is for investments to be made by Qwest in educational projects, infrastructure and other contributions as agreed upon by Qwest and the Staff and approved by the Commission. Section 2 of the Agreement's infrastructure investment and educational programs options, unlike Sections 1, 3, 4 and 5, do not involve any monetary payments or credits by Qwest.

Another important point, is that these are voluntary contributions on Qwest's part. Qwest is agreeing as part of the Settlement, to make voluntary contributions to specific educational projects, charitable contributions or infrastructure investments designed to benefit consumers. Of these three categories, the Commission may decide that all of the contributions should go into infrastructure investments or that some of the contributions should also go into educational projects.

Finally, if as Time Warner claims, Section 2 of the Agreement is in reality a redirected penalty, then an equally plausible argument could be made that Sections 3, 4 and 5 (the CLEC credit provisions) are redirected penalties as well.

Time Warner also argues that a problem may also exist with respect to the Commission's lack of authority to appropriate funds. Time Warner Brief, p. 10. Time Warner argues that in Arizona the Legislature retains all appropriations authority with respect to the Commission and that the Arizona Constitution does not permit the Commission to appropriate money directly. *Id.* Time Warner believes that the Settlement Agreement appears to contemplate a direct appropriation by the Commission of public funds. *Id.* Once again, Time Warner's arguments are misplaced. The Commission receives no funds under the Settlement Agreement, including Section 2. Time Warner's argument may have some merit if the Agreement provided for contributions to be made to the Commission. But, it does not. If the Commission receives no funds under the Agreement, the Commission has nothing to appropriate.

2. Section 2 of the Agreement Provides Direct Benefit to Consumers Who Were Also Adversely Affected by Qwest's Conduct

Section 2 of the Agreement provides some direct benefit to consumers through infrastructure investments and educational projects designed to educate Arizona consumers on various telecommunications issues. Depending upon the projects selected, Section 2 of the Agreement may also provide indirect benefits for CLECs.

AT&T, as well as others, are critical of this provision of the Settlement, because they believe that it "artificially inflates the apparent value of the settlement, [and] it also gives Qwest credit for legal obligations it already has, or forces new obligations on Qwest, that are unrelated to the issues raised in the proceedings." See, e.g., AT&T Initial Brief, p. 20. Staff disagrees.

Both AT&T and RUCO share a concern that Qwest will receive a return on any investments it makes under Section 2. AT&T Brief, p. 21; RUCO Initial Brief, p. 6. They point to Qwest's position on this issue at the hearing. See AT&T Brief, p. 21 (citing Tr. 110-111). However, the Settlement Agreement actually does not address this issue. It is up to the Commission to determine how the investments will be dealt with for rate base and rate case purposes.

AT&T also argues that Section 2 of the Agreement does not relate to the issues in this Docket, and thus, it is inappropriate to include such a provision. AT&T Brief, p. 22. For instance, AT&T states that Qwest's witness acknowledged that voluntary contributions do not affect either of the two benefits of competition, e.g., consumer choice and lower rates. *Id.* Yet AT&T's witness acknowledged on cross-examination that an educational program designed to educate consumers on local competition issues could possibly benefit CLECs. Tr. p. 286. AT&T's witness also acknowledged on cross-examination that certain infrastructure investments under Section 2, may also benefit CLECs indirectly, since Qwest may be obligated to make that infrastructure available to CLECs at UNE rates or on a resale basis.

Still another argument was that the provision allowing contributions to charitable organizations would allow Qwest to take credit for its misconduct. The Staff desires to make clear that while charitable contributions were listed as a category of investment, nothing in the Agreement

requires that Qwest make any contributions to charitable organizations. Rather, it could be decided that Qwest make all of the Section 2 investments in unserved or underserved areas.

C. Several Parties Proposals Would Result in Unlawful Discrimination and May Otherwise be Beyond the Commission's Authority

One of the primary complaints of Time Warner and AT&T is that the Settlement does not sufficiently compensate the CLECs. Time Warner Brief, p. 7; AT&T Brief, p. 19. However, the CLECs themselves do not agree on whether the Commission has the authority to require Qwest to actually implement some of the proposals which the CLECs recommend.

For instance, Time Warner states that "[i]t is critical to Time Warner Telecom that the discount apply to *all* services purchased from Qwest – particularly interstate services." Time Warner Brief, p. 8. Staff Witness Kalleberg's testimony in the 252(e) proceeding explicitly stated that Staff was not recommending the inclusion of interstate services, because the Commission does not have jurisdiction over these services. See, S-1, Kalleberg Direct, p. 91. Moreover, when asked about whether the Commission would have the authority to require Qwest to include interstate services for purposes of the Section 3 discount, AT&T Witness Pelto stated that he believed that the Commission may not have the authority to require Qwest to give a 10% discount on interstate services. Tr. pp. 256-257.

Another proposal that was the subject of much legal debate was the proposal that the discounts should be applied both retroactively and prospectively. Staff originally proposed this as part of its recommended penalty in the 252(e) case. See, S-1, Kalleberg Direct, p. 84. While AT&T suggests that the discounts be applied both retroactively and prospectively, they implied that to do this it may be necessary to include both Eschelon and McLeod, because of argument made by the carriers and Qwest, that not to include them in a longer discount period would be discriminatory. Tr. p. 259. AT&T Witness Pelto summed up the dilemma on cross-exam:

> Q. So your proposal is that all the CLECs would get an 18-month prospective discount including Eschelon and McLeod?
>
> A. I'm indifferent. I would defer to how the Commission would decide to treat Eschelon and McLeod. And the reason I'm hedging a little bit is

that in Minnesota, either Eschelon and McLeod or Qwest or the group made an argument that not allowing Eschelon and McLeod to participate was discriminatory.

Q. Because there would be a different prospective rate that would apply to Eschelon and McLeod?

A. Correct. And I don't feel that Qwest should be able to use the discrimination in favor of Eschelon and McLeod as a shield to protect itself from making competitive restitution. So I would say to the Commission that if you conclude that not giving the prospective discount to McLeod and Eschelon would make the prospective discount discriminatory, subject to attack on those grounds, then go ahead and include them. That's sort of the lesser evil. The fairest thing to do, the most equitable thing it would seem to me would be not to allow them to take advantage of a situation that was instituted in part by their complicity with Qwest in this scheme.

Q. Wouldn't including them in a prospective discount effectively reward them?

A. Yes, it would.

Q. Do you feel that's the right thing to do?

A. No, I don't think it's the right thing to do. Again, I'm looking at it from a lesser evils perspective. If that was necessary to make it lawful, then the Commission should do it.

Tr. pp. 259-260.

And, with regard to AT&T's proposal that the UNE-P credits also apply prospectively, Witness Pelto acknowledged on cross-examination that there would be similar concerns:

Q. So again, I mean, given that Eschelon received this credit and other CLECs didn't, at least as far as the prospective piece goes, if I understand your testimony, everyone could get the credit, including Eschelon?

A. Again, I'm indifferent. I leave that to the Commission's discretion. I would anticipate that McLeod and Eschelon, perhaps Qwest, would argue that treating Eschelon and McLeod differently going forward raises some sort of discrimination issue. And again, if necessary to resolve that and be able to make restitution to all the other CLECs as should be done, if that needs to be extended to McLeod and Eschelon, I would probably say to the Commission you should do that in that instance, recognizing, of course, the perverse policy of that particular piece.

Tr. pp. 266-267

Similarly, RUCO recommends that timeframe of the discounts or credits under Section 3, 4 and 5 of the Agreement be extended to 3 years, rather than 18 months. Yet, Eschelon and McLeod only received the discounts for 18 months. RUCO Brief, p. 4. Thus, if the Commission were to adopt RUCO's recommendation of a three-year term for the discounts to be given to other CLECs, those other CLECs would be getting discounts for a longer term than Eschelon and McLeod received them. Tr. p. 455. Again, such an approach may raise the same type of discrimination issue with respect to McLeod and Eschelon, discussed by AT&T Witness Pelto.

The one additional penalty that the Commission could order without encountering discrimination or jurisdictional concerns that was raised by the parties but not contained in the Settlement Agreement is a 10% discount on other intrastate services, including special and switched access charges and private line services. While these are not 251(b) or (c) services, the Commission certainly has the authority to order that they be included in any penalty in this Docket. The Commission should consider, however, that no party pursued a tariff discrimination claim during the course of this proceeding and Witness Johnson acknowledged that a separate action against Qwest based upon illegal discounts on a tariffed rate was still under consideration. Tr. p. 358.

D. The Settlement Agreement Does Not Adversely Affect the Commission's Ability to Invoke its Contempt Powers for Any Violation Under A.R.S. 40-424.

One of RUCO's primary concerns with the Settlement Agreement is that it does not believe that the Settlement holds Qwest accountable for its improper and illegal conduct. RUCO Initial Closing Brief, p. 3. RUCO goes on to state that it believes that the Settlement needs to contain a finding of wrongdoing and that there needs to be an Order proscribing such conduct, or it will be difficult for the Commission to appropriately address other unlawful conduct. RUCO Initial Closing Brief, p. 11. Staff respectfully disagrees with RUCO's assessment of the Commission's enforcement powers.

RUCO claims that an Order adopting the settlement would only allow the Commission to invoke its contempt powers for failing to comply with the Settlement's explicit requirements. An

Order proscribing a broad category of misconduct would allow the Commission, according to RUCO, to invoke its contempt powers for any act or actions that falls within the scope of the category of misconduct. RUCO Initial Closing Brief, p. 11. RUCO also argues that a cease and desist order, if adopted by the Commission would allow the Commission to *invoke its contempt* powers if Qwest engages in similar conduct in the future. RUCO Initial Closing Brief, p.11.

However, when one examines these claims from a legal perspective, no matter what kind of order the Commission enters, a contempt finding requires in all cases that the accused be given an opportunity to respond. Thus, if Qwest acts in an unlawful manner in the future, irrespective of the type of Order the Commission enters, the Staff can recommend contempt penalties under A.R.S. Section 40-424 but Qwest must be afforded a hearing and opportunity to respond. This is true even if as RUCO urges, the Commission were to enter an order proscribing a broad range of misconduct.

In addition if the Commission's ability to enter a contempt order is what is of concern to RUCO, Mr. Ahearn himself acknowledged on cross-examination that the fourth clause of the Settlement contains an acknowledgement by Qwest that violations of the Commission's Order approving the Settlement may be punished by contempt after notice and hearing:

> Whereas Qwest acknowledges that Commission approval of this Settlement Agreement shall constitute a Commission decision directing that Qwest implement the provisions of the Settlement Agreement which are intended to assure future compliance with respect to the filing requirements of Section 252(e) of the Telecommunications Act, to assure timely implementation of future cost dockets, and to assure that Qwest files with the Commission any Settlement Agreement with a telecommunications carrier that would result in the carrier not participating in any generic docket of industry-wide general concern pending before the Commission and that violations of those provisions may be punished by contempt after notice and hearing as provided by ARS Section 40-424.

Tr. pp. 464-465.

E. The Settlement Agreement is Reasonable and in the Public Interest.

Staff believes that the Settlement Agreement, while certainly not everyone's perfect solution as the record indicates, is a reasonable resolution of the very complex and difficult issues presented. In the words of RUCO's Director, "[t]he Settlement Agreement goes a long way to redress many of

the grievances against the company in these combined cases." RUCO-1, Prefiled Direct Testimony of Stephen Ahearn, p. 2. (Hrg. Exh. RUCO-1).

The Settlement Agreement provides for monetary penalties and other voluntary payments and credits by Qwest in excess of $20 million dollars. The Settlement Agreement requires Qwest to dismiss the pending lawsuit against the Commission in the Federal District Court of Arizona over the Commission's final Phase II decision in the Wholesale Pricing Case, Docket No. T-00000A-00-0194. The Settlement contains important non-monetary provisions designed to ensure that Qwest does not engage in the same type of conduct in the future.

RUCO expressed concerns with Staff's "Trust but Verify" policy reflected in the Settlement Agreement. RUCO does not believe that Qwest is deserving of trust at this time, based upon past conduct. RUCO Initial Closing Brief, p. 7. RUCO also does not believe that it should be the job of the Commission to verify the representations made by Qwest. RUCO believes that the Commission should be able to rely on the veracity of those representations. *Id.* at 8. Finally, RUCO believes that the check to ensure that companies act honestly are swift and stiff penalties, not a verification procedure. *Id.*

While Staff agrees that the Commission should be able to rely on the veracity of a regulated entity's representations, RUCO itself acknowledges that "Qwest has demonstrated a pattern of abusing the Commission's trust that goes back further than the conduct that is the subject of the 252 docket and 271 subdocket." RUCO Brief, p. 7. This explains why Staff's policy is not simply one of "Trust" but one of "Trust but Verify". Moreover, RUCO's policy would appear to be one of "Trust but Fine"; yet RUCO acknowledges that "[i]n the past, the payment of substantial penalties has not deterred Qwest from wrongdoing."

Finally, AT&T suggests that it would be inappropriate for the Commission to utilize the "public interest" standard in reviewing the Settlement Agreement because not all parties have signed on to the Agreement. AT&T's arguments to the contrary notwithstanding, the Commission has approved many settlements in the past, which have not been signed by all parties, under the public interest standard, and there is no reason to deviate from that standard now. (See Decision No. 66028,

July 3, 2003 G-01032A-02-0914 (Cons.) and Decision No. 63487 (March 30, 2001) T-01051B-99-0105 (Cons.)

III. CONCLUSION

The Settlement Agreement is a reasonable resolution of the complex issues raised in the three enforcement dockets against Qwest. The Commission should approve it as it is in the public interest.

RESPECTFULLY submitted this 29th day of October, 2003

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